



Republican Policy Committee

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Our Constitution "Did Not Create a Monarchy"

The President Is Not Above the Law

The United States Supreme Court held in 1982 that a President of the United States is entitled to *absolute immunity* from damages liability for his *official, presidential* acts. The Court found this immunity "rooted in the constitutional tradition of the separation of powers." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

Now, President Bill Clinton has been sued for civil damages for acts alleged to have been committed while he was Governor of Arkansas, and he claims *not absolute immunity*, but a *temporary immunity* that extends throughout his term of office. (Perhaps it would be more accurate to say that the President is claiming an immunity that is absolute but not eternal. During the course of his presidency it is absolute, but it ends after four or eight years.)

The President's claim of immunity is extraordinary, though, because this lawsuit is so far from alleging an abuse of official, presidential acts. Can the same Constitution that protects absolutely a president's official acts also immunize (even for a period of years) the kind of acts that are alleged in this case? The acts alleged are these:

- Acts that cannot be official, presidential acts because they were alleged to have been committed before Mr. Clinton's election to the presidency.
- Acts that would not be official, presidential acts even if committed as alleged after Mr. Clinton's inauguration.
- Acts that allegedly were committed deliberately and willfully and not merely negligently.
- Acts that allegedly denied to the plaintiff her federally-guaranteed civil rights, including her rights to due process of law and to the equal protection of the laws.
- Acts that allegedly were part of a conspiracy.
- Acts that, if true, would constitute an abuse of official power by a sitting governor.

Earlier this month, a three-judge panel of the United States Court of Appeals for the 8th Circuit turned down President Clinton's claim of temporary immunity. "Article II of the Constitution, which vests the executive power of the federal government in the President, did not create a monarchy," the majority opinion says. "To the contrary, the President, like all other government officials, is subject to the same laws that apply to all other members of our society." There will be an appeal of the panel's decision.

Paula Jones Versus Bill Clinton

The President of the United States has been sued by Paula Corbin Jones. Mrs. Jones alleges that on May 8, 1991, Bill Clinton, who then was Governor of Arkansas, invited her to a hotel room where he touched her in a sexually provocative way and asked her to perform a sexual act. At the time, Mrs. Jones was an employee of the State of Arkansas. She alleges that the actions of Mr. Clinton (and a State trooper) deprived her of her constitutional rights, in part through a conspiracy, and caused her severe emotional distress. She also alleges that the President has defamed her.

President Clinton denies all of Mrs. Jones's allegations.

The Complaint Filed by Mrs. Jones

Count I of the complaint alleges that Mrs. Jones was harassed and assaulted, denied equal employment opportunity, and denied liberty, property, and reputation in violation of her constitutional rights to equal protection and due process. Denial of these rights by a person who acts with a presumption of government authority is made actionable by a key civil rights statute, commonly known as "section 1983", which reads in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . ." 42 U.S.C. 1983 (1988 ed.).

Count II of Mrs. Jones's complaint alleges that President Clinton conspired with Danny Ferguson, the state trooper who allegedly arranged her visit to Clinton's hotel room, to deny her her rights to the equal protection of the laws. Ferguson is also named in the suit. Such conspiracies are made actionable by another key civil rights statute, commonly known as "section 1985", which provides in pertinent part: "If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws" and the conspirators "do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages. . . ." 42 U.S.C. 1985 (1988 ed.)

Count III of the complaint alleges that Governor Clinton's "sexual advances, assaults upon and imprisonment of Jones' person" were "so outrageous . . . and extreme" as to "beyond all possible bounds of decency" and caused Mrs. Jones severe emotional distress. Section 46(1) of the *Restatement of Torts, 2d* summarizes the general law as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. . . ."

Count IV alleges that President Clinton and his agents, by denying the facts of Jones's complaint and characterizing her as a liar, have maliciously and willfully defamed her by making statements they knew to be false. Trooper Ferguson also is named in count IV. Note that count IV is the only count that alleges actions taken after Mr. Clinton became President.

Presidential Immunity Granted at the District Court

As noted, the President claimed to be immune from civil lawsuits during his term of office. The district court rejected that claim of absolute immunity but held that the constitutional separation of powers did entitle Mr. Clinton to a "temporary or limited immunity" during his term of office, and the court stayed the trial for the duration of his term. However, the district court said that discovery would proceed as to all persons, including the President. *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994). Both sides appealed, Clinton seeking to enjoin the discovery and Jones seeking to go forward with both discovery and trial.

Presidential Immunity Supported at the Department of Justice

The Department of Justice has sided with Mr. Clinton. This is not surprising but it is in many ways troubling. An analysis of the Department's position is beyond the scope of this paper, but one scholar's reminder of the dual (and sometimes contradictory) role of the United States Department of Justice may be helpful:

"[T]he Attorney General must provide legal justifications for the continual, uninterrupted flow of power to the President, or, by legal manipulation of statutory language, guard against any encroachments upon presidential power already acquired. In addition, the Attorney General must perform the contradictory role of simultaneously being the impartial guardian of the basic law and partisan advocate for presidential initiatives that ultimately transfer power from the legislature to the executive branch of government." M. Sheffer, *Presidential Power: Case Studies in the Use of the Opinions of the Attorney General* ix (1991).

Presidential Immunity Overturned at the 8th Circuit

On January 9, 1996, a three-judge panel of the United States Court of Appeals for the 8th Circuit (with one judge dissenting) overturned the decision of the district court. The majority opinion said:

"... The question before us ... is whether the President is entitled to immunity, for as long as he is President, from civil suits alleging actionable behavior by him in his private capacity rather than in his official capacity as President. ...

"We start with the truism that Article II of the Constitution, which vests the executive power of the federal government in the President, did not create a monarchy. The President is cloaked with none of the attributes of sovereign immunity. To the

contrary, the President, like all other government officials, is subject to the same laws that apply to all other members of our society. . . .

“ . . . Nevertheless, mindful that for the sake of the nation’s general good the Constitution empowers officials to act within the scope of their official responsibilities, the Supreme Court has recognized ‘that there are some officials whose special functions require a full exemption from liability’ for their performance of official acts. The list of those entitled to absolute immunity from civil liability include the President of the United States for his official acts, members of Congress for their legislative acts, judges in courts of general jurisdictions for judicial acts, prosecutors for prosecutorial functions, and certain executive officials performing certain judicial and prosecutorial functions in their official capacities. . . .

“ . . . We are unaware, however, of any case in which any public official ever has been granted any immunity from suit for his unofficial acts. . . .

“The parties agree, and so do we, that the fundamental authority on the subject of presidential immunity is the plurality opinion in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). [T]he issue before the Court in that case was whether the President is entitled to absolute immunity (rather than qualified immunity or no immunity at all) from personal civil liability for his official acts. By only a five-to-four majority, the Court held that, ‘in view of the special nature of the President’s constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the “outer perimeter” of his official responsibility.’ By definition, unofficial acts are not within the perimeter of the President’s official responsibility at all, even the outer perimeter. The Court’s struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion, here advanced by Mr. Clinton, that beyond this outer perimeter there is still more immunity waiting to be discovered. . . .

“ . . . Accordingly, we hold that a sitting President is not immune from suit for his unofficial acts. In this case it is undisputed that most of the acts alleged by Mrs. Jones clearly fall outside the zone of official presidential responsibility, given that they occurred while Mr. Clinton was still governor of Arkansas [excepting Count IV].” *Jones v. Clinton*, — F.3d —, 1996 U.S. App. LEXIS 253, at pages *6-*8, *11-*12 & n. 7 (citations & footnotes omitted; edited slightly).

There was a concurring opinion and a dissenting opinion. The concurrence emphasized three aspects of the majority opinion, viz. the rights of the plaintiff, the impact on the presidency, and the claims against Trooper Ferguson. The dissenting judge would have gone beyond the district court’s position to hold that while Mr. Clinton continues in office he is entitled to a stay for both the trial and the discovery process.

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